CF0000057462

(2)

XII-189/(Jail)
C. J. P. R /7-86/500

G&A 552 /90

High Court of Madhya Pradesh
Bench (Criminal)
Recd on 26 FEB 1990
Registration No. 312
Receipt 82
High Court Jabalpur.

APPEAL OF PRISONER

No 40/44 Name राजू

Father's name भजनू यादव

Residence पुराना गोरेला, जि० बिलासपुर (म०प्र०) Age 21 वर्ष

Sentenced to आजीवनकारावास on 30.1.90

Under section 302 भा०दं०वि० by सत्र न्यायाधीश बिलासपुर के न्यायालय के तृतीय अतिरिक्त न्यायाधीश सत्र प्रकरण क्रमांक-64/1988

it is explained to the prisoner that if he states or wishes to be represented by legal practitioner the Appelate court will not proceed with the case for seven days unless the legal paactitioner appears earlier. If the legal practitioner does not appear within seven days, he may not be heard at all if the prisnor states that he does not wish to be represented by legal practitioner, the court may proceed at once wich the case and will not be obliged to give at hearing to any legal practitioner who should appear.

1. Date of Application for copy of Judgement 30.1.90
2. Date of which copy received 6.2.90
3. Date on which Appeal sent 8.2.90
4. Whether the prisoner wishes to be represented or not- (yes, ~~No~~)

No. 40/44 Name राजू आ० भजनू यादव

Confined in प्रथम श्रेणी जिला Jail बिलासपुर (म०प्र०)

No 468 /पो०/90, बिलासपुर dated 8.2.90 198

Forwarded to the **CHIFF** JUDICIAL MAGISTRATE Bilaspur (M.P.)

together with a copy of Judgement and order passed in the case for favour of transmission to the proper Appelliate Court.

Superintendent
जिला जेल बिलासपुर (म०प्र०)

Date of receipt in C. J. M. S. Office

Date of receipt of record to accompany the)
The memo of Appeal of the Appellate Court)

No. Q/C.J.M/90 Dated 14-2-90 198

Forwarded to the Officer in charge, Record Room, Bilaspur for information & necessary action.

मुख्य न्यायिक दण्डाधिकारी
बिलासपुर (म० प्र०)

Date of receipt in Appellate Court

(P. T. O)

For wanted to Ded Reg H/C Jabalpur.
In dis d Jail appeal no notify
Dam.
and ST 64/88
in cumm Hall

Office Memo
Dated
Ded Dist & Sess

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HIGH COURT OF CHHATTISGARH : BILASPUR

Criminal Appeal No. 374 OF 1990

Munna alias Raghunandan

Vs.

The State of Madhya Pradesh (now State of Chhattisgarh)

&

Criminal Appeal No. 552/1990

Raju

Vs.

The State of Madhya Pradesh (now State ofChhattisgarh)

Coram :- Hon'ble Shri Fakhruddin, Acg. Chief Justice &
Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Shri Surendra Singh, learned Sr. Advocate with Mr. Neeraj Mehta, counsel for the appellant.

Shri M.P.S.Bhatia, P.L. for the State.

JUDGMENT

(Delivered on 8.11.2005)

Per Dilip Raosaheb Deshmukh, J.

Criminal Appeal No.374/1990 filed by Munna alias Raghunandan and Criminal Appeal No.552/1990 filed by Raju are directed against the judgment dated 30th January 1990 delivered by Shri B. K. Shrivastava, Addl. Sessions Judge to Sessions Judge, Bilaspur in sessions case No.64/1988 whereby the appellant-Raju was convicted under Section 302 I.P.C. for committing murder of Santosh Kumar and the appellant-Munna @ Raghunandan was convicted under Section 302 read with Section 34 of the I.P.C. for committing murder of Santosh Kumar in furtherance of common intention shared with Raju and both were sentenced to imprisonment for life.

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2. Co-accused Dinesh Jaiswal who was also prosecuted under Section 302 read with Section 34 of the I.P.C. alongwith the above named appellants was absconding throughout the trial and was proceeded under Section 299 of the Code of Criminal Procedure. Appellant-Raju after undergoing sentence was released from Central Jail, Raipur on 18.12.2002 on the eve of Guru Ghasidas Jayanti after receiving special remission of sentence.

3. Admittedly, appellants-Raju, Munna and co-accused Dinesh worked in Manav Mandir Hotel situated at Gaurela and shared the house at Singhal Tola, Gaurela with Dhaneshwar P.W.2, Balram P.W.7 and the deceased Santosh.

4. The prosecution story is that in the intervening night of 13th & 14th November 1987 Santosh was sleeping in the room at the place where appellant-Raju used to sleep. Due to this there was a quarrel between the appellants, co-accused Dinesh Jaiswal and the deceased Santosh. In the intervening night of 14th & 15th November 1987 the deceased Santosh alongwith Dhaneshwar P.W.2 and Balaram P.W.7 was sleeping in the room. At about 2.00 A.M. the appellants Raju, Munna with co-accused Dinesh came there. Appellant Raju kicked Santosh who was sleeping. A scuffle ensued between Santosh and Raju during which Santosh fell down. The appellants and co-accused Dinesh beat Santosh with fists. At this juncture, the appellant-Raju took out a knife and brutally assaulted Santosh several times at the chest, back and hand. Santosh died at the spot instantaneously. Dhaneshwar P.W.2 and Balram P.W.7 saw the occurrence. When they tried to intervene, the appellants threatened to beat them. They shouted.

Petla P.W.1 came to the spot. The appellants and co-accused Dinesh ran away.

5. Dhaneshwar P.W.2 lodged F.I.R. Ex.P.1 at 8.30 A.M. in P.S. Gaurela situated two kilometers away from the place of occurrence. Sub-Inspector R.C. Mishra wrote marg intimation Ex.P.7, reached the place of occurrence and prepared inquest Ex.P.9 and sent the dead body of Santosh for post-mortem. Dr.M.P.Khare P.W.5 who conducted the autopsy found the following injuries on the body of Santosh :

i. Punctured wound situated on the back on right side at a point 1.5 cm. lateral to mid line and 13.5 cm. from inferior angle of the right scapula, wound of entry placed vertically, 2.5 cm. in length and 0.75 cm. in width in centre narrowing at ends to form acute angles. Edges were clean cut inverted and stained with blood. Wound communicated with right abdominal cavity at a point 3 cm. right–wards from vertebral column between 9th & 10th rib posteriorly. Clotted blood was present in the surrounding muscles along the course of the wound which was obliquely lateral and forwards.

ii. Incised wound situated 9.5 cm below the injury No.1 on the right side of back, measuring 2 ½ cm. in length & 0.75 cm. in width, narrow at both ends. Edges were clean cut, stained with blood. It was 6 cm. deep passing laterally and downwards through the muscles of right lower back. Clotted blood was present on the surrounding muscles.

iii. Incised wound situated over posterior fold of left oxilla, situated 17 cm. distant from tip of left shoulder. It measured 2 ½ cm. in length and 3/4th cm. in width in centre, narrowing at acute angles on both ends. Edges were clean cut, invert and stained with blood. Surrounding muscles had large amount of clotted blood.

iv. Punctured wound situated over right anterior chest 1 cm. below & medial to right nipple. It measured 2 1/2 cm x 0.75 cm, placed horizontally, narrow at both ends to form an

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acute angles (measurements 2.5 cm. x 0.75 cm.) edges were clean cut, inverted stained with blood. Wound communicates with right sided thoracic cavity making its way into the lung parenchyina. (Middle and lower lobes). Huge amount of clotted blood was present in right anterior intercostal muscles.

v. Through & through Incised wound over left upper arm, wound of entry situated over medial aspect of left upper arm in its middle measure 2 ¾ cm. x 0.75 cm. edges were clean cut, inverted stained with blood. Wound of exit over lateral aspect of left upper arm situated 15 cm. distant from tip of left shoulder, edges were clean cut, everted blood stained surrounding muscles certained blood clots.

Dr. Khare P.W.5 opined that all the injuries mentioned above were ante-mortem in nature and were caused by a sharp cutting object with a long cutting edge. Cause of death was opined to be shock and haemorrhage due to punctured wounds (No.1 & No.4). Sub-Inspector R.C. Mishra seized a bloodstained knife from the place of occurrence vide Ex.P.12. After completion of investigation, the appellants alongwith co-accused Dinesh were prosecuted under Section 302 read with 34 of the I.P.C.

6. The appellants-Munna and Raju abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as eight witnesses. The trial Judge relying on the testimony of Petla P.W.1, Dhaneshwar P.W.2, Balram P.W.7 as also the medical evidence of Dr. M.P.Khare P.W.5, convicted and sentenced the appellants Munna and Raju as shown in para 1.

7. Senior Advocate Shri Surendra Singh, learned counsel for the appellants Munna argued that there was no cogent and reliable evidence on record to hold that the appellant-Munna had shared the common intention with the appellant Raju for committing

murder of Santosh. The incident had occurred in the very late hours of night. It was pitch dark inside the room. The appellants had, after finishing work, gone to the place of occurrence which was their home to sleep. There was no previous enmity or motive for the appellants to cause the death of Santosh. An incident of a trivial nature had suddenly sparked off the occurrence when the appellant Raju suddenly took out a knife and stabbed Santosh Kumar. It was wholly an isolated act of Raju without any prior concert with co-appellant Munna. The evidence of Balram P.W.7 that at the time when Raju was repeatedly assaulting Santosh, the appellant Munna was holding Santosh was wholly unreliable since no such statement was made to the police by Balram P.W.7 under Section 161 Cr.P.C. or by Dhaneshwar P.W.2 in the F.I.R. Ex.P.1. Reliance was placed on *Mitter Sen and others v. State of U.P.*, reported in **A.I.R. 1976 S.C. 1156,** *Rambilas Singh and others v. State of Bihar* reported in **A.I.R. 1989 S.C. 1593** and *Kashmira Singh v. State of Punjab* reported in **A.I.R. 1994 S.C. 1651.** So far as the appellant-Raju was concerned, it was urged that the appeal is only of academic interest since appellant-Raju was released after undergoing sentence upon grant of remission by the State Government. On the other hand, Shri M.P.S.Bhatia, learned Panel Lawyer for the State arguing in support of the impugned judgment placed reliance on *Ramesh Singh alias Photti v. State of A.P.* reported in **A.I.R. 2004 S.C. 4545** and contended that the fact that appellant Munna continued to hold the deceased without making any effort to prevent co-accused from further attacking would lead to the irresistible and inescapable conclusion that he

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shared the common intention with co-appellant Raju to cause death of Santosh.

8. We have heard the rival contentions and perused the record of sessions case No. 64/1988. The testimony of Balram P.W.7 and Dhaneshwar P.W.2 clearly goes to show that a day prior to the incident there was a sudden quarrel at night upon an incident of trivial nature during which the appellants-Raju and Munna had scuffled with Santosh. Balram P.W.7 has testified that next day, late at night while they were sleeping inside the room the appellants Raju and Munna alongwith Dinesh came at about 2.00 A.M. and started quarrel with Santosh. Appellant-Raju started assaulting Santosh with a knife while the appellant Munna and co-accused Dinesh held Santosh. They tried to liberate Santosh but the appellants threatened that if they intervened they would also be beaten. The testimony of Balram P.W.7 that the appellant-Raju had assaulted Santosh by knife finds corroboration from the F.I.R. lodged by Dhaneshwar P.W.2 on 15.11.1987 at Police Station Gaurela and also from the medical evidence of Dr. M.P.Khare P.W.5. Nothing has been elicited in the cross-examination of Balram P.W.7 by the appellant-Raju so as to discredit this part of his testimony that the appellant-Raju had assaulted Santosh by knife. The testimony of Dr. Khare P.W.5 leaves no manner of doubt that the deceased Santosh was assaulted several times brutally on vital parts by the knife resulting in his death due to shock and haemorrhage as a result of the two punctured wounds received by him on vital parts. The presence of Balram P.W.7 at the scene of occurrence is natural.

He has absolutely no animosity against the appellants and had no reason to falsely implicate them.

9. Having considered the evidence of Balram P.W.7 and Dr. M.P.Khare P.W.5 and the F.I.R. Ex.P.1, we are of the considered opinion that the learned trial judge has rightly convicted and sentenced the appellant-Raju under Section 302 I.P.C. for commiting murder of Santosh.

10. The only point which requires our consideration in this appeal now is whether the appellant-Munna can be held constructively liable for the act of appellant-Raju. So far as Dhaneshwar P.W.2 is concerned, he was present at the scene of occurrence but did not state that the appellant-Munna had held Santosh to facilitate assault by Raju by a knife. According to him, appellants-Raju, Munna and co-accused Dinesh were all fighting with Santosh. The place of occurrence was the habitat of the appellants and they had gone there to sleep as usual. It appears that a trifling incident which had occurred a day earlier suddenly got sparked off when Raju's leg hit the deceased who started abusing him. Balram P.W.7 has nowhere stated that the appellant-Raju had entered the room brandishing the knife in his hand. The F.I.R. lodged by Dhaneshwar P.W.2 nowhere stated that the appellants had held Santosh while Raju was assaulting Santosh by knife. Therefore, the testimony of Balram P.W.2 that the appellant Munna and co-accused Dinesh had held Santosh while the appellant-Raju was assaulting Santosh by knife is nothing but an improvement in the prosecution story which fails to inspire confidence. This is an important omission in the statement

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of Balram P.W.7. Sub-Inspector R.C.Mishra P.W.8 has in cross-examination clearly stated that Balram had in his statement Ex.D-2 recorded under Section 161 Cr.P.C. did not state that the appellant-Munna and co-accused Dinesh had held Santosh while the appellant-Raju was assaulting him by knife.

11. The appellants had no previous enmity with the deceased Santosh. It appears that an incident of trivial nature occurring a day prior to the occurrence during which the appellant-Raju had stepped on the feet of Santosh who was sleeping suddenly sparked off the occurrence on the next date when Raju kicked Santosh who was sleeping. The prosecution evidence does not reveal that the appellant-Munna had the knowledge that the appellant-Raju had a knife in his possession. The evidence also does not show that the appellant-Raju had entered the room brandishing the knife. It appears that the appellant-Raju suddenly got agitated to such an extent that he took out the knife and stabbed Santosh several times on vital parts. This act of Raju was his isolated act without any prior concert with the co-appellant Munna.

12. In *Ramesh Singh alias Photti v. State of A.P.* reported in **A.I.R. 2004 S.C. 4545** it was observed by the Apex Court that common intention essentially being a state of mind, it is very difficult to procure direct evidence to prove such intention. In most cases it has to be inferred from the act like the conduct of the accused or other relevant circumstances of the case. An inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which attack was made, from the nature of injuries caused by one or

some of the appellants. The contributory acts of the persons who were not responsible for the injury can further be inferred from the subsequent conduct after the attack. Even an omission on the part of the accused can indicate the sharing of the common intention, the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted.

13. In the case of *Ramesh Singh* (supra), it was further held that the fact that the accused continued to hold the deceased all alone without making any effort to prevent co-accused from further attacking would lead to the irresistible and inescapable conclusion that the accused persons shared the common intention with the co-accused. However, in this case, there is no reliable evidence on record to show that the appellant-Munna had held the deceased Santosh at the time when the appellant-Raju had assaulted Santosh by the knife. In view of the omission in the statement under Section 161 Cr.P.C. as also in the F.I.R. Ex.P.1, the testimony of Balram P.W.7 is nothing but a clear improvement in the prosecution story which cannot be relied on. The circumstances of the case also clearly indicate that there was absolutely nothing to show that the appellants had gone to the room with a prior concert to cause the death of Santosh. The evidence led by the prosecution clearly shows that the act of the appellant-Raju in assaulting the deceased Santosh by a knife was an isolated act. The appellant-Munna neither had the knowledge that the appellant-Raju had a knife with him nor shared the

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intention with Raju to cause the death of Santosh. In *Kashmira Singh v. State of Punjab* reported in **A.I.R. 1994 S.C. 1651** it was held that although the appellant-accused had held the deceased and another accused taking out a knife from his pocket inflicted single injury on the deceased it could not be held that the accused had prior knowledge that another accused was armed with a knife since common intention on his part was not proved. His conviction under Section 302 read with Section 34 of the I.P.C. was set aside. In *Rambilas Singh and others v. State of Bihar* reported in **A.I.R. 1989 S.C. 1593** it was held that unless there was material to show that overt acts or acts were done in furtherance of common intention of all, conviction with the aid of Section 34 of I.P.C. could not be sustained. In *Mitter Sen and others v. State of U.P.* reported in **A.I.R. 1976 S.C. 1156**, two of the four accused persons were unarmed. The third accused had a knife but he was not brandishing it. It was in his pocket. Fourth accused was alleged to be carrying a *danda* but his participation was not accepted by the High Court. It was held that it was difficult to attribute common intention to the accused persons who were unarmed.

14 Applying the principles of appreciation of evidence as laid down by the Apex Court, in our considered opinion, the common intention under Section 34 of the I.P.C. cannot be attributed to the appellant-Munna for the isolated act of the appellant-Raju. The appellant-Munna had accompanied Raju to his habitat where they usually slept at night. He had no prior enmity with Santosh. He had no knowledge that the appellant-Raju was carrying a knife.

The incident had occurred very late at night. The evidence of Dhaneshwar P.W.2 and Balram P.W.7 also clearly shows that it was pitch dark inside the room. No injuries were found on the person of Santosh which could have been inflicted due to beating by hands and fists. Injuries sustained by Santosh were such which could only be inflicted by a sharp knife.

15. The evidence led by the prosecution does not show that the appellant-Raju had entered the room brandishing the knife. There was a trivial incident followed by a quarrel in which appellant-Raju suddenly took out the knife and assaulted Santosh several times on vital parts. In the facts and circumstances of the case, we have therefore no hesitation in holding that the prosecution has failed to prove that the appellant-Munna shared the common intention with the appellant-Raju to cause the death of Santosh. Conviction of the appellant-Munna under Section 302 read with Section 34 of the I.P.C. cannot, therefore, be sustained.

16. In the result, the appeal by Raju (Cri.A.No.552/1990) is dismissed. Conviction of Raju under Section 302 I.P.C. and sentence awarded thereunder are maintained. Appellant-Raju has already undergone sentence. The appeal (Cri.A.No.374/1990) filed by Munna is allowed. Conviction of appellant-Munna @ Raghunandan under Section 302/34 of the I.P.C. and the sentence awarded thereunder by the trial Court are set aside. The appellant-Munna @ Raghunandan is acquitted of the charge under Section 302/34 of I.P.C.

Sd/-
Acting Chief Justice

Sd/-
Dilip Raosaheb Deshmukh
Judge
8.11.2005

Anjani